SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-580

BENNIE STONE GOODEN, *et al.*,

Petitioners,

v.

MISSISSIPPI STATE UNIVERSITY, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MISSISSIPPI STATE UNIVERSITY, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Bennie Stone Gooden, et al., respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 19, 1974.

Opinions Below

The opinion of the Court of Appeals is reported at 499 F.2d 441 (5th Cir. 1974) and is reprinted in the Appendix hereto, pp. 22a-27a. The district court did not enter an opinion, but its findings and order, not reported, are reprinted in the Appendix hereto, pp. 13a-18a, 20a-21a.

Jurisdiction

The judgment of the Court of Appeals was entered on August 19, 1974 (p. 28a); a petition for rehearing or in the alternative for rehearing *en banc* was denied on October 16, 1974 (p. 30a). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

I.

Whether the Court of Appeals erred in directing the dismissal of this action as moot and in reversing a district court determination that injunctive relief was necessary to prevent state defendants from providing material aid to Mississippi's private segregationist academies.

II.

Whether the Court of Appeals erred in holding that the alleged cessation of unlawful activity subsequent to service upon defendants of the Complaint and Motion for Preliminary Injunction foreclosed an award of attorneys' fee under 20 U.S.C. §1617.

Constitutional and Statutory Provisions Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment and 20 U.S.C.A. §1617 (Volume 20, page 463) which provides as follows:

> §1617 *Attorneys Fees*
>
> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any

agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of Title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, *upon a finding that the proceedings were necessary to bring about compliance,* may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. (emphasis added)

Statement of the Case

Plaintiffs are black children in attendance at Clarksdale, Mississippi public schools which, upon desegregation, lost the majority of its white students, enrolled in grades 7-12, to the Lee Academy, Clarksdale's segregationist private secondary school. All Mississippi private segregationist secondary schools with athletic programs, including the Lee Academy, are members of the Academy Athletic Conference (also known as the "Academy Activities Commission of the Mississippi Private School Association)."[1]

The Complaint herein charged that defendants, the Board of Trustees of Institutions of Higher Learning, Mississippi State University, and the President thereof, had granted the segregationist Academy Athletic Conference permission to use the State University's gymnasium and related facilities for the conduct of its annual championship and all-star basketball games scheduled for the week of Feb-

[1] These facts were established through the record of *Norwood* v. *Harrison*, 413 U.S. 455 (1973), of which the district court took judicial notice (pp. 14a-15a). The non-discriminatory counterpart to the Academy Athletic Conference is the Mississippi High School Activities Commission: all public and non-discriminatory private schools are members of that organization.

ruary 21 and March, 1972, in violation of the Equal Protection Clause and 42 U.S.C. §1983. A preliminary injunction, to prevent the specified use, a permanent injunction against the underlying policy authorizing such uses, costs and attorneys' fees were sought (pp. 1a-6a).

Friday, February 11, 1972, plaintiffs hand delivered to the Attorney General of Mississippi, and mailed to each of the defendants, a copy of the Complaint and the Motion for Preliminary Injunction or in the Alternative Motion for Temporary Restraining Order which had that day been posted to the Clerk of the District Court for filing (p. 7a). After receiving those documents, the Attorney General's representative contacted Mississippi State University and/or officials of the Academy Athletic Conference and arranged for the Athletic Conference to withdraw its request to use the state owned facilities (pp. 9a, 11a, 15a).

On the following Monday—February 14, 1972—the Academy Athletic Conference addressed a letter to the President of Mississippi State University, with carbon copy to the Assistant Attorney General assigned to this case. The letter stated that the segregationist athletic conference "wishes to withdraw any and all of its requests to hold functions at Mississippi State University as of this date, February 14, 1972. We especially wish to withdraw the request for hosting the Academies' . . . championship basketball games to be held the weekend of the 24-25-26 of February, 1972" (p. 11a). The cancellation of the February games at Mississippi State made unnecessary further proceedings on plaintiffs' motion for preliminary injunctive relief and no hearing was held thereon.

March 13, 1973, defendants filed a "Notice of Motion," through which they renewed the motion to dismiss contained in their Answer, alleging that the controversy was

moot as a result of the Academy Conference's February 14, 1972, letter (p. 12a).

March 22, 1973, the case was called for hearing before the District Court (pp. 13a-18a). Defendants declined to offer any proof of mootness and rested on the allegations contained in their Answer and the February 14, 1972, letter. During the hearing the Court, from the bench, made the following findings:

(a) The constitutional violation had been established by the pleadings: defendants' Answer admitted that defendants had plenary authority over Mississippi State University and other public institutions of higher learning and that they had authorized the segregationist academies to conduct their basketball all-star and championship games using the gymnasium and supporting facilities of Mississippi State University. Accordingly, the burden of proving "mootness" was assigned to defendants (pp. 9a, 16a-18a).

(b) Defendants' policy of permitting private segregationist academies use of public facilities was still in effect: the Academy Conference (not a party to the action) had withdrawn its *request* to use the facilities; but defendants did not withdraw and have never withdrawn permission to use facilities[2] (p. 16a). In addition, it was clear from the pleadings that the cessation of unlawful activity "was timed to blunt the force of a lawsuit," *Lankford* v. *Gelston*, 364 F.2d 197, 203 (4th Cir. 1966), having occurred only after the Complaint and Motion for Preliminary Injunction or Temporary Restraining Order had been delivered to counsel opposite and mailed to the clerk of the Court for filing (pp. 6a-7a, 11a).

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[2] The District Court asked counsel for defendants to provide some assurance that the Board of Trustees would adopt a new policy meeting constitutional standards; the Assistant Attorney General could not provide such assurance (pp. 15a-17a).

(c) State officials are urged repeatedly to provide assistance to Mississippi's private segregationist academies; an injunction could be used by defendants as a shield to resist such demands:

> It would give . . . [defendants] something on which they could stand if requests are made in the future by racially discriminatory school groups . . . We all know that when these requests come . . . from racially discriminatory schools that they are difficult to turn down. The Court is not naive. The only way they could be turned down effectively and feasibly [by the Board of Trustees or Mississippi State] would be to have something on the books that says . . . [public facilities] cannot be used (pp. 16a-17a).

The District Court concluded that it "could not say that merely because there has been a withdrawal of the request . . . that there is no reasonable expectation that the wrong will be repeated" (p. 18a). The injunction was issued, but plaintiffs' request for attorneys' fees was denied without opinion or discussion (pp. 20a-21a).[3] Defendants appealed from the entry of the injunction and plaintiffs cross-appealed from the denial of attorneys' fees.

August 19, 1974, the Court of Appeals entered its opinion directing the district court to vacate the injunction and to dismiss the action as moot, and affirming the denial of at-

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[3] At the conclusion of March 22, 1973 hearing, plaintiffs' counsel requested an award of attorneys' fees which request was denied by the Court without explanation. Plaintiffs renewed their request and cited 20 U.S.C. §1617 by letter to the district court dated March 29, 1973 (p. 18a). Again, the District Court summarily denied the request through its order of April 4, 1973 (pp. 19a). However, the district court did not have the benefit of *Northcross* v. *Board of Educ.*, 412 U.S. 427 (1973), decided two months after the order denying fees was entered; nor could it anticipate *Bradley* v. *School Board of Richmond*, 40 L.Ed. 2d 476 (1974).

torneys' fees[4] (pp. 22a-27a). It reasoned that plaintiffs had the burden of proving that the case was *not* moot; *i.e.*, that plaintiffs were required to establish that permission to use Mississippi State had been granted prior to, or during the one year following, the unlawful act specified in the Complaint (p. 27a). The Court held that the case had been rendered moot by the Academy Conference's decision to withdraw its request for Mississippi State facilities (p. 27a). It also determined that the cancellation of the basketball games at Mississippi State, subsequent to delivery of the pleadings to counsel for defendants, foreclosed an award of attorneys' fees under 20 U.S.C. §1617, reasoning that "no finding that these proceedings were necessary to bring about compliance with statutory or constitutional rights was made or could be supported by this record" (p, 27a).

Reasons for Granting the Writ

I.

Summary

The Court of Appeals has decided an important question of federal law having widespread impact in a way in conflict with applicable decisions of this Court. Dismissal of this action as moot frustrates the District Court's efforts to establish and maintain only unitary public school systems in the State of Mississippi.[5] Judge Keady, the District Judge, "has lived with this . . . [problem] for so many years and . . . has a much better appreciation both of the

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[4] Plaintiff school children were also taxed with costs (p. 28a).

[5] See *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Norwood* v. *Harrison*, 413 U.S. 455 (1973).

extent to which these . . . matters are actually problems in the . . . [State of Mississippi], and of the need for injunctive relief to resolve . . . [them] to the extent they exist." *Gilmore* v. *City of Montgomery*, 41 L.Ed.2d 304, 321 (1974) (Mr. Justice Marshall, concurring in part and dissenting in part). The decision below provides defendant state officials with an incentive to engage in "resist and withdraw" tactics, *i.e.*, to materially assist private segregationist academies unless and until lawsuits are filed challenging separately each of their activities, and it imposes upon the private bar the duty to enforce the Constitution, acting as watchmen on a day-to-day basis to prevent the recurrence of unlawful acts.

The decision below also confuses the doctrine of "mootness" arising in the context of a change in the status of the parties, with the issue of "mootness" arising in the context of the cessation of unlawful activity or the alleged elimination of a controversy's subject matter and, in this additional respect, departs from controlling decisions of this Court. *Compare, e.g., DeFunis* v. *Odegaard*, 40 L.Ed.2d 164 (1974); *Super Tire Engineering Co.* v. *McCorkle*, 40 L.Ed.2d 1 (1974), *with, e.g., United States* v. *W. T. Grant & Co.*, 345 U.S. 629 (1953); *United States* v. *Phosphate Export Association*, 393 U.S. 199 (1968).

Finally, the Court of Appeals' *sua sponte* finding that this litigation was not "necessary to bring about compliance with . . . constitutional rights," and its decision to deny counsel fees to plaintiffs' attorneys, is in conflict with Congress' intent in enacting 20 U.S.C. §1617 as definitively interpreted by the Court in *Bradley* v. *School Board of Richmond*, 40 L.Ed.2d 476 (1974), and *Northcross* v. *Board of Education*, 412 U.S. 427 (1973).

In the face of a clear uncontroverted violation of plaintiffs' constitutional rights, the Court of Appeals has freed

defendants from injunctive relief and permitted them to avoid any attorneys' fee liability; the holding even results in costs being taxed against plaintiff black children and parents (p. 29a). And in this manner the "resist and withdraw" tactic is established as an effective strategy for undermining constitutional rights.

II.

Mootness

The Court of Appeals, in finding this case moot, relies upon precedent holding that an intervening change in circumstances (generally, a change in plaintiffs' status revealing the absence of "standing"), compels a finding that either plaintiffs no longer suffer any injury from the policy or practice under challenge or that the Court, for practical reasons, is not able to remedy the wrong.[6] The

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[6] The cases cited by the Court of Appeals illustrate the point: *Barron* v. *Bellairs*, 496 F.2d 1187 (5th Cir. 1974) (new legislation removing plaintiff class from purview of the statute under challenge, rendered controversy, as to plaintiffs, moot); *National Lawyers Guild* v. *Board of Regents*, 490 F.2d 97 (5th Cir. 1974) (suit to enjoin university to permit a specific meeting of plaintiff group, rendered moot when time for meeting had passed); *Merkey* v. *Board of Regents*, 493 F.2d 790 (5th Cir. 1974) (suit to enjoin recognition of college club rendered moot after plaintiff student left the school); *DeSimone* v. *Linford*, 494 F.2d 1186 (5th Cir. 1974) (effort to obtain preliminary injunction ordering reinstatement pending final determination of administrative appeal, rendered moot by the completion of the administrative appeal); *United States Servicemen's Fund* v. *Killen Independent School District*, 489 F.2d 693 (5th Cir. 1974) (suit challenging school district's refusal to permit school auditorium to be used for anti-war theatrical production, rendered moot by the cessation of the Vietnam War and indication that plaintiffs no longer desired facilities); *Hollon* v. *Mathis Independent School District*, 491 F.2d 92 (5th Cir. 1974) (plaintiffs' graduation rendered moot a challenge to school regulation).

doctrine has recently been applied in *DeFunis* v. *Odegaard*, 40 L.Ed.2d 164, 169 (1974), wherein plaintiff was assured the result he sought through his lawsuit—graduation from the University of Washington Law School—and a "determination . . . of the legal issues . . . [was] no longer necessary to compel that result and could not serve to prevent it." [7] However, the Court has distinguished the issue of mootness as it arises in *DeFunis* from the issue as it arises when defendants claim that the lawsuit's subject matter has been eliminated by their "voluntary cessation of allegedly illegal conduct." *United States* v. *W.T. Grant & Co.*, 345 U.S. 629, 632 (1953).[8] Generally, the *DeFunis* issue arises through an event affecting plaintiffs while the *W.T. Grant* issue arises through activity initiated by defendants.

The Court of Appeals' failure to distinguish between these two separate and distinct lines of cases is at the foundation of its error: the case at bar does not involve any claim that petitioners, black children attending Mississippi public schools, no longer have an interest in, or can suffer any injury from, defendants' policy of assisting the State's segregationist academies; rather, the only issue raised is whether the Academy Conference's decision to cancel its 1972 games at Mississippi State offered sufficient

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[7] See also: *Super Tire Engineering Co.* v. *McCorkle*, 40 L.Ed. 2d 1, 8 (1974) (employers who brought suit challenging a state welfare program for striking workers continued to "retain sufficient interest" in lawsuit's subject matter—the state statute and program—after its striking employees returned to work); *Roe* v. *Wade*, 410 U.S. 113, 124-25 (1973) (plaintiff pregnant women challenging abortion statutes continued to retain sufficient interest in the statutes after the termination of their pregnancies).

[8] See, for example, *United States* v. *Phosphate Export Ass'n*, 393 U.S. 199, 202 (1968), wherein defendant association claimed it had ceased to exist and that the allegedly illegal sales could not again take place, *i.e.*, that the lawsuit's subject matter—the illegal sales—had been eliminated and the case rendered moot.

assurance that unlawful practices would not recur, resulting in the elimination of the action's subject matter.

The District Court, but not the Court of Appeals, tested defendants' claim of mootness, based upon the alleged cessation of unlawful activity, by the proper standard recently summarized by the Court:

> The test for mootness . . . is a *stringent* one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave 'the defendants . . . free to return to his old ways.' . . . A case might become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur. . . . [There is] a *heavy burden of persuasion* which we have held rests upon . . . [defendants]. [There must be proof] that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary.
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> *United States* v. *Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (emphasis added).

The District Court determined that defendants had not met their "heavy burden of persuasion." *It found of paramount importance the absence of any change in defendants' policy toward the use of public facilities by segregationist schools: the Academy Conference, not a party to the action, had withdrawn its request to use Mississippi State University but defendants continued to authorize such illegal use* (pp. 15a-18a).

The trial court also recognized that state officials are torn between two school systems, one public and integrated, a second, private, segregated and owing its existence to the desegregation of public schools. Judge Keady, drawing

upon his own judicial experience, knew that the potential for recurring violations was great since the academies could be expected to continue their practice of pressuring public officials for support (pp. 17a-18a). He viewed the practices under challenge as but a continuation of the long history of Mississippi support for segregationist academies: *Coffey* v. *State Educational Finance Commission,* 296 F. Supp. 1389 (S.D. Miss. 1969) (tuition grants invalidated); *Coffey* v. *State Educational Finance Commission,* C.A. No. 2906, September 2, 1970 (unreported) (tuition loan program invalidated); *Green* v. *Connally,* 330 F. Supp. 1150 (D.D.C. 1970) (tax exemptions invalidated); *Norwood* v. *Harrison,* 413 U.S. 455 (1973) (text book aid invalidated); *Driver* v. *Tunica County School District,* 323 F. Supp. 1019 (N.D. Miss. 1970) (salaries paid to academy teachers invalidated); *Cook* v. *Hudson,* 365 F. Supp. 855 (N.D. Miss. 1973) (public school district regulation prohibiting employment of professionals who enroll their own children in segregationist academies upheld); *McNeal* v. *Tate County School District,* 460 F.2d 568 (5th Cir. 1972) (transfer of school building to segregationist academy subjected it to restrictions); *Taylor* v. *Coahoma County School District,* 345 F. Supp. 891 (N.D. Miss., 1972) (transfer of school property to segregationist academies enjoined); *Anderson* v. *Canton Municipal Separate School District,* 5th Cir., No. 28030, August, 1973, (unreported) (injunction issued to enjoin transfer of school buildings or property to Canton Academy followed by Motion for Contempt Judgment and then Consent Order directing school officials to assure the return to public schools of stadium bleachers and flood lights removed to Canton Academy); *Blackwell* v. *Anguilla Line Consolidated School District,* 5th Cir., No. 28030, Nov. 24, 1969 (unreported) ("No abandoned school facility under this plan, if any, shall be used for private school purposes");

United States v. *Mississippi*, 499 F.2d 425 (5th Cir. 1974) (lease of public school building to private segregationist academy voided).[9]

The "resist and withdraw" tactic used by defendants and the Academy Athletic Conference has been uniformly rejected, until now, as a basis for finding mootness since changes "timed to anticipate or blunt the force of a lawsuit offer insufficient assurance" that the practice at issue will not be repeated. *Lankford* v. *Gelston*, 364 F.2d 197, 203 (4th Cir. 1966); *Cypress* v. *Newport News General & Nonsectarian Hospital*, 375 F.2d 648, 658 (4th Cir. 1967). The decision below can serve only to encourage state defendants and the Academy Conference to violate constitutional rights until plaintiff class musters the resources necessary for cases such as these.[10] The tactic promises to

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[9] At least one case is still pending in Mississippi: *Bishop* v. *Starkville Academy*, N.D. Miss. Civil Action No. 7497-K, (challenges Miss. Code, 1972, §37-23-61, as amended 1974, to the extent that it authorizes annual tuition grants of $600. to educationally disadvantaged or gifted children enrolled in private segregationist schools). Other forms of state assistance to Mississippi segregationist academies persist. See, for example, Miss. Code, 1972, §47-5-91 (1964 and 1969 enactments), authorizing tuition and transportation payments for state penetentiary employees' children in segregationist academies; statute modified original 1942 enactment (Miss. Code, 1942 §7931), providing for transportation and tuition payments for education of penitentiary employees' children in neighboring public school district.

The problem has taxed black students' resources in other states as well: *Wright* v. *Baker County Board of Education*, 501 F.2d 131 (5th Cir. 1974) (Georgia); *Graham* v. *Evangeline Parish School Board*, 484 F.2d 649 (5th Cir. 1973) (Louisiana); *Gilmore* v. *City of Montgomery*, 473 F.2d 832 (5th Cir. 1973) (Alabama). Two such cases have been resolved in this Court: *Norwood* v. *Harrison*, *supra* and *Gilmore* v. *City of Montgomery*, 41 L.Ed.2d 304 (1974).

It has also been the subject of congressional concern and legislation, 20 U.S.C. §1605(d)(1)(A).

[10] "[T]his sort of case is an enterprise on which any private individual should shudder to embark. . . . To secure counsel willing to undertake the job of trial . . . necessarily means that some-

be most effective in undermining efforts to monitor and eliminate state support for segregationist academies since black students and their parents are not privy to segregationist school meetings or policy decisions and cannot anticipate requests for and grants of public assistance from or to such schools. Indeed, the Academy Conference used Mississippi State University for its 1970-71 games, without challenge, because petitioners first learned of these events through newspaper accounts the day after they occurred. When the elimination of state support for racially discriminatory schools—a matter of high national priority—is so readily frustrated, injunctive relief to prevent repeated violations is necessary.

These considerations, found compelling by the district court, were given no weight on appeal despite the limited scope of review authorized in these cases. An appellate court can only reverse a district court's determination on the issue of mootness upon finding that "no reasonable basis" supports the lower court's decision: "[t]he Chancellor's decision is based upon all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it."[11] *United States* v.

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one—plaintiff or lawyer—must make a great sacrifice unless equity intervenes." *Bradley* v. *School Board of Richmond*, 40 L.Ed.2d 476, 492, n. 25 (quoting the district court).

[11] The Court of Appeals also implies that the burden is upon the plaintiffs to prove that recurring violations *will* occur. It determined, from a silent record, that "no proof was made that permission of this sort had ever previously been given" (p. 26a). Since the burden of proving mootness under *W. T. Grant, supra*, is assigned to defendants, the court should have found that there was no proof that permission *had ever been denied*. Defendants declined to offer any proof of mootness (p. 14a), and plaintiffs consequently offered no proof of previous violations. [As we note in the text, the Academy Conference used Mississippi State during the 1970-71 school term, or a full year before the lawsuit was filed. This fact, although not in the record, was brought to the attention of the Court of Appeals at oral argument and in the petition for rehearing].

W. T. Grant & Co., 345 U.S. 629, 633-34 (1953). This standard is particularly appropriate in cases challenging state support for racially segregated education. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971). The District Court was either clearly correct or it was not clearly incorrect in finding the potential for recurring violations, and the Court of Appeals abused its discretion and misperceived controlling precedent in vacating the injunction.

III.

Attorneys' Fees

The District Court summarily denied attorneys' fees without the benefit of this Court's decisions in *Northcross, supra,* and *Bradley, supra,* construing 20 U.S.C. §1617. The Court of Appeals should have remanded the case to the District Court for reconsideration in light of these intervening decisions; instead, it *sua sponte* foreclosed an award of attorneys' fees.

In *Northcross* v. *Board of Education*, 412 U.S. 427, 428 (1973), the Court held that "plaintiffs in school cases are 'private attorneys general' vindicating national policy in the same sense as are plaintiffs in Title II cases." Accordingly, it was held that since attorneys' fees must be awarded routinely to prevailing plaintiffs in Title II cases, "unless special circumstances would render such an award unjust," [*Newman* v. *Piggy Park Enterprises*, 390 U.S. 400, (1968)] so must they be awarded under 20 U.S.C. §1617 in cases charging racial discrimination in education. Moreover, the statutes' objective of encouraging individuals to vindicate Congressional policy against racial discrimination, has led the court to reject as evidence of "special circumstances" a variety of factors including the absence

of frivolous defenses, good faith, or that some members of the court agreed with defendants, or that plaintiffs were not obligated to pay any fees. *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968); *Miller* v. *Amusement Enterprises, Inc.,* 426 F.2d 534 (5th Cir. 1970). Similarly, in deciding that under 20 U.S.C. §1617, counsel fees should be awarded for services performed prior to the effective date of that Act, the Court considered the importance of encouraging individuals to vindicate national policy against racial discrimination in education. *Bradley* v. *School Board of Richmond,* 40 L.Ed.2d 476, 491-93, and n. 27 (1974). Read together, the cases establish the principle that limitations upon fee awards to prevailing plaintiffs, acting as "private attorneys general," are disfavored and 20 U.S.C. §1617's requirement that a fee award is to be made "upon finding that the proceedings were necessary to bring about compliance," must be construed in that light.

Equally important, much of the debate in the Senate leading to the passage of 20 U.S.C. §1617, centered on the language of the statute cited by the Court of Appeals to deny counsel fees. It is clear that the prerequisite for a fee award, a "finding that the proceedings were necessary to bring about compliance," was intended to protect against two abuses: the champertous filing of lawsuits to obtain a fee and the unnecessary protraction of litigation to trial and judgment when defendants have made a *bona fide* and adequate offer of settlement. *See* Cong. Rec. S. 5485 (daily ed. April 22, 1971), (colloquy between Senators Javits and Cook), 117 Cong. Rec. 5490-91. Thus the statute would bar or limit an attorneys' fee herein if defendants had been willing to enter into a consent order on the merits and to an award of attorneys' fees for services rendered through the filing of the Complaint, but plaintiffs had insisted upon trial on the merits. However, defendants declined to pur-

sue that course and have insisted instead that injunctive relief is to be resisted at all costs.

It is uncontroverted that the pleadings were hand delivered to counsel for defendants three days before the Academy Conference withdrew its request to use Mississippi State University (p. 7a). This fact, when viewed in the light of this Court's decisions in *Northcross* and *Bradley* and the legislative history, compels a presumption that, in this case, "proceedings were necessary to bring about compliance," with plaintiffs' constitutional rights under the Fourteenth Amendment; the appeals court decision foreclosing such a finding is simply untenable.

Defendants must be assigned the burden of proving that the proceedings were champertous or marked by *bona fide* offers of settlement rejected by plaintiffs. The case should be remanded to the district court for reconsideration of the attorneys' fee issue in light of that standard compelled by *Bradley, Northcross* and the legislative history as discussed above.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN CHACHKIN
CHARLES STEPHEN RALSTON
MELVYN R. LEVENTHAL
10 Columbus Circle
New York, New York 10019

FRED L. BANKS, JR.
538½ North Farish Street
Jackson, Mississippi 39202

Counsel for Petitioners

APPENDIX

Complaint

(Filed February 14, 1972)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

CIVIL ACTION NO. EC72-12K

BENNIE STONE GOODEN, JR., by his father, Bennie Stone Gooden, Sr.; JOHN WESLEY LONG and LAWRENCE LONG, by their mother, Mrs. Herbie Cannon Long,

Plaintiffs,

vs.

MISSISSIPPI STATE UNIVERSITY; DR. WILLIAM L. GILES, President of Mississippi State University; THE BOARD OF TRUSTEES OF INSTITUTIONS OF HIGHER LEARNING,

Defendants.

---

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343(3) and (4). This is a suit in Equity authorized by 42 U.S.C. §1983, which seeks to redress the deprivation of rights assured and protected by the Fourteenth Amendment to the Constitution of the United States.

2. Plaintiffs seek a preliminary and permanent injunction enjoining defendants from affording The Academy Athletic Conference of Mississippi, and its member schools, the use of athletic and other facilities at Mississippi State University and other state owned institutions of higher learning.

II

3. Plaintiffs Bennie Stone Gooden, Jr., John Wesley Long and Lawrence Long are black citizens of the United States residing in Clarksdale, Mississippi. They are students in attendance at the public schools of the Clarksdale Municipal Separate School District. Their right to a racially integrated and otherwise non-discriminatory public school system, and their right to the elimination of all state support for racially segregated schools, have been frustrated and/or abridged by the creation of the racially segregated Lee Academy of Clarksdale, Mississippi, the formation of The Academy Athletic Conference of Mississippi, and the policies and practices of defendants as set forth below. The named plaintiffs are minors and are represented by their parents, Bennie Stone Gooden, Sr. and Mrs. Herbie Cannon Long.

4. The named plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. They sue in their own behalf and in behalf of students throughout the state of Mississippi who are aggrieved by the policies and practices of defendants complained of herein. The members of the class on whose behalf plaintiffs sue are so numerous so as to make it impracticable to bring them all individually before the Court, but there are common questions of law and fact involved and common grievances arising out of common wrongs. A common relief is sought for plaintiffs and all members of the class. The plaintiffs fairly and adequately represent the interests of the class. The policies and practices of defendants complained of herein are applicable to the plaintiff class generally. Moreover, the questions of law and fact common to the members of the class predominate over any

question affecting only individual members and a class action is superior to other available methods for adjudication of the controversy.

5. Defendant Mississippi State University is an institution of higher learning owned, supported and operated by the State of Mississippi. Defendant William L. Giles, is the President, the chief executive officer and administrator, of Mississippi State University. Defendant, The Board of Trustees of Institutions of Higher Learning governs, and has plenary authority and control over, all state owned institutions of higher learning in the state of Mississippi.

III

6. a) Beginning with the 1964-65 school year—when the first public school districts in Mississippi were required to integrate under freedom of choice—and through the present, numerous private racially segregated schools and academies have been either formed or enlarged, which schools have established as their objective and/or have had the effect of affording white children of the state of Mississippi racially segregated elementary and secondary schools as an alternative to racially integrated and otherwise nondiscriminatory public schools.

b) These private racially segregated schools have formed and are members of The Academy Athletic Conference which Conference sponsors and conducts athletic programs and events for the racially segregated private schools of the State.

7. Defendant Mississippi State University has granted The Academy Athletic Conference permission to use the

University's gymnasium and campus facilities for the purpose of holding an overall conference championship in basketball; these playoff games are scheduled to be held during the week of February 21-26, 1972.

8. Defendant Mississippi State University has granted The Academy Athletic Conference permission to use the University's gymnasium and campus facilities for the purpose of holding Academy Conference all-star games in basketball; these all-star games are scheduled to be held during the second week of March, 1972.

9. Defendants, in permitting The Academy Athletic Conference the use of state owned gymnasiums and facilities, have provided state aid and encouragement to racially segregated education and have thereby impeded the achievement of racially integrated public schools in violation of plaintiffs' rights assured and protected by the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, plaintiffs respectfully pray that this Court:

1. Enter a preliminary injunction enjoining defendants to deny The Academy Athletic Conference and its member schools the use of Mississippi State University's gymnasium and facilities for the conduct of basketball playoffs, tournaments and all-star games, scheduled for February and March, 1972.

2. Enter a permanent injunction enjoining defendants to deny The Academy Athletic Conference and its members schools the use of all facilities subject to the control of the Board of Trustees of Institutions of Higher Learning.

3. Grant plaintiffs their costs herein including reasonable attorney's fees.

4. Grant such additional or alternative relief as the Court deems just and equitable.

February 11, 1972

Respectfully submitted,

MELVYN R. LEVENTHAL
ANDERSON, BANKS, NICHOLS
& LEVENTHAL
538½ North Farish Street
Jackson, Mississippi 39202

FRANK R. PARKER
233 North Farish Street
Jackson, Mississippi 39202

JACK GREENBERG
Suite 2030
10 Columbus Circle
New York, New York 10019

Counsel for Plaintiffs

Motion for Preliminary Injunction or in the Alternative for a Temporary Restraining Order

(Title Omitted)

Plaintiffs respectfully move this Court to enter an order preliminarily enjoining Mississippi State University, its President, Dr. William L. Giles and the Board of Trustees of Institutions of Higher Learning from affording The Academy Athletic Conference of Mississippi and/or its member schools the use of Mississippi State University's gymnasium and other facilities for the conduct of Academy Athletic Conference basketball play-offs, tournaments and all-star games or other programs pending full hearing on plaintiffs' Complaint and Motion for Permanent Injunction.

Unless the Court grants the relief prayed for herein plaintiffs will be irreparably injured: The Academy Athletic Conference has scheduled basketball play-offs at Mississippi State University beginning February 21, 1972.

February 11, 1972

Respectfully submitted,

MELVYN R. LEVENTHAL
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& LEVENTHAL
538½ North Farish Street
Jackson, Mississippi 39202

FRANK R. PARKER
233 North Farish Street
Jackson, Mississippi 39202

JACK GREENBERG
Suite 2030
10 Columbus Circle
New York, New York 10019

Counsel for Plaintiffs

Certificate of Service

I hereby certify that on this 11th day of February, 1972, I caused to be served by personal delivery upon Honorable William Allain, Assistant Attorney General, State of Mississippi, New Capitol Building, Jackson, Mississippi and by United States mail, postage prepaid, upon Dr. William L. Giles, President, Mississippi State University, Starkville, Mississippi and Mr. W. O. Stone, President, Board of Trustees, Institutions of Higher Learning, Post Office Box 1491, Jackson, Mississippi, copies of a Complaint, Motion For Preliminary Injunction Or In The Alternative For A Temporary Restraining Order and Notice of Motion.

MELVYN R. LEVENTHAL

Answer

(Title Omitted)

Come now the Defendants, Mississippi State University, Dr. William L. Giles, President, Mississippi State University, and the Board of Directors of the State Institutions of Higher Learning, and answer the Complaint filed herein as follows:

First Defense

This Court lacks jurisdiction of any of the defendants or the subject matter in this cause.

Second Defense

The Complaint fails to state a claim against the defendants upon which relief can be granted.

Third Defense

The Complaint filed herein fails to satisfy the prerequisite to a class action pursuant to Rule 23 of Federal Rules of Civil Procedure.

Fourth Defense

1. Defendants deny that this court has jurisdiction under any of the constitutional amendments or statutes set out in Paragraph 1 of the Complaint.

2. Defendants deny the allegations contained in Paragraph 2 of the Complaint.

Answer

3. Defendants lack information sufficient to form a belief as to the truth of the averments of the first, second and last sentences of Paragraph 3 of the Complaint and deny the remaining portion of Paragraph 3.

4. Defendants deny the allegations contained in Paragraph 4 of the Complaint.

5. Defendants admit the allegations of Paragraph 5 of the Complaint.

6. Defendants deny the allegations contained in Paragraph 6 of the Complaint, including subparagraphs a and b therein.

7. Defendants admit the allegations of Paragraph 7 of the Complaint, but would further state that upon initiation of said Academy Activities Commission of the Mississippi Private School Association, the acceptance and/or permission of said commission to use the facilities of Mississippi State University was withdrawn effective February 14, 1972. (Ex. "A")

8. Defendants admit the allegations contained in Paragraph 8 of the Complaint, but would further state that the Academy Activities Commission of the Mississippi Private School Association has withdrawn its request to hold its championship games in the facilities at Mississippi State University on February 24, 25, and 26, 1972. (Ex. "A")

9. Defendants deny the allegations contained in Paragraph 9 of the Complaint.

WHEREFORE, Defendants deny that plaintiffs are entitled to any relief in this action and pray that the action be dismissed at plaintiffs' cost.

Respectfully submitted,

A. F. SUMMER, Attorney General
of the State of Mississippi

WILLIAM A. ALLAIN, First Assistant
Attorney General of Mississippi

ED DAVIS NOBLE, JR., Special Assistant
Attorney General of Mississippi

By: ED DAVIS NOBLE, JR.

Exhibit "A" Annexed to Answer

February 14, 1972

Dr. W. L. Giles, President
Mississippi State University
State College, Mississippi

Dear Dr. Giles:

The Academy Activities Commission of the Mississippi Private School Association wishes to withdraw any and all of its requests to hold functions at Mississippi State University as of this date, February 14, 1972.

We especially wish to withdraw the request for hosting the Academy Activities Commission's championship basketball games to be held the weekend of the 24-25-26th of February, 1972.

With very best regards, I am

Sincerely yours,

/s/ GLENN A. CAIN
Glenn A. Cain
Executive Secretary

GAC:lkt

cc: Mr. Charles Shira, Athletic Director,
Miss. State University
Mr. Ed. Nobles, State Attorney General's Office

Notice of Motion

[Motion to Dismiss]

Please take notice that the undersigned will bring the attached Motion to Dismiss [Answer, pp. 8a-11a] or in the alternative Summary Judgment which is contained in Defendants' answer pursuant to Rule 12 (b), F.R.C.P., on for hearing before this Court at the United States Courthouse in the City of Greenville, State of Mississippi, on Thursday, the 22nd day of March, 1973, at 1:30 P.M. or as soon thereafter as counsel may be heard.

A.F. Summer
Attorney General of
the State of Mississippi

By: Ed Davis Noble, Jr.

District Court Findings—Excerpts from Transcript

Note: The following are all of the district court's findings entered during the March 22, 1972 hearing and relating to the issue of mootness.

No. EC-72-12-K

The following proceedings were had in the United States District Court, Northern District of Mississippi, on March 22, 1973, before the Honorable William C. Keady, Chief Judge, at Greenville, Mississippi.

APPEARANCES:

For the Plaintiffs:

The Honorable Melvyn Leventhal

For the Defendants:

The Honorable Ed Davis Noble, Jr.

The Court: The Court will call EC-72-12, Bennie Stone Gooden, Jr., and others versus Mississippi State University and others, defendants, pursuant to notice of the Court to set this matter down at this time for final hearing or other disposition that may be appropriate.

Are the plaintiffs ready?

Mr. Leventhal: Yes, your Honor.

The Court: Are the defendants ready?

Mr. Noble: Yes, Your Honor.

The Court: All right, Mr. Leventhal—

Mr. Noble: May it please the Court, preliminarily, I believe we noticed that we would bring forward—

The Court: A motion to dismiss?

Mr. Noble: —a motion to dismiss and in the alternative summary judgment, Your Honor.

The Court: All right. Do you wish to present that?

Mr. Noble: Your Honor—

The Court: Let's see first for the record whether there is any evidence to be taken. Do you have any evidence in connection with your motion or otherwise?

Mr. Noble: No, sir. The only thing we have, Your Honor, of course, is the memorandum with the attached exhibit. [Letter from Academy Conference, February 14, 1972, attached to Answer]

The Court: Well, the exhibit . . . will be considered as offered in evidence. [It is] . . . attached to the memorandum?

Mr. Noble: Yes, sir, that was mailed to you.

The Court: Let's get [it] . . . and mark . . . [it].

The Clerk: That will be Exhibit One for the Defendant.

Mr. Leventhal: I'm familiar with it, Your Honor.

The Court: All right.

Now, before proceeding further, Mr. Leventhal, for the record, do you have any evidence to present at this time?

Mr. Leventhal: No, Your Honor.

The Court: All right.

Mr. Leventhal: However, we would ask the Court to take judicial notice of the record presented to this Court in *Norwood* v. *Harrison* and we ask the Court to take judicial notice of the fact that we have a private academy string in the state and secondly establish by *Norwood* v. *Harrison* that all senior academies conducting junior or senior high athletic programs are members of the conference and sought and obtained permission to use Mississippi State University facilities.

The Court: All right.

Does the state have any objection to the Court taking such judicial notice?

Mr. Noble: We would object, Your Honor, of course, to the extent that since we consider the case moot that it is unnecessary for the Court to take judicial notice at this time of the existence of the private schools or of any academy athletic conference.

The Court: Well, the Court does take judicial notice of that because of information contained in its own records. What it may be worth for the purpose of the present hearing is another question.

You may proceed with your motion to dismiss . . . .

• • •

The Court: Was this matter ever brought before the board of trustees and did they adopt a resolution as a matter of policy?

Mr. Noble: No, Your Honor, it was never brought before the board because it was not necessary, for the simple reason that as soon as the Complaint was filed it was brought to my attention and as a result I personally represented to Mississippi State that at that time the—

The Court: But this suit has been pending against the board for over a year. They have not adopted any official policy regarding the use of public facilities?

Mr. Noble: No, sir, as far as I know, they haven't. As far as my office is concerned, Your Honor, we are only subject to call by the board. We might add that taking the Complaint at face value, Your Honor, there is only representation there as to Mississippi State, one, that the plaintiffs themselves are only students at the Coahoma County public school system and that any sort of support that

would have accrued that might injure these plaintiffs would come to Lee Academy. That is the only locale that would injure these particular plaintiffs. Mr. Leventhal, I would assume, in his drawing the Complaint, did not represent or has not offered any other particular evidence to show that there is any damage as related to any activity held at the University of Mississippi, Mississippi State College for Women or any other representation to any of the other institutions. . . .

• • •

The Court: Well, it would be easy enough to settle it if the board of trustees would adopt a resolution declaring the policy. That would be easy enough. They have had a year. And if they will do it, I am willing to give them another opportunity and hold up. But it is the fact they have not adopted a policy. And as Mr. Leventhal points out, the only reason this matter was not brought into the Court was the decision of one not a defendant to withdraw his request. There was no request by the college officials.

Mr. Noble: The request was made by the Academy Athletic Conference.

The Court: And permission was granted. But permission was not withdrawn. Had permission been withdrawn by the state university people—

Mr. Noble: Your Honor, if I may, I would like to state to you that I attempted to reach Dr. Giles and get the letter of transmittal back that the request was accepted and permission therefor withdrawn.

The Court: I understand. Your clients have been sued in federal court and extraordinary injunctive relief asked. Now, you have had over a year, you might say, to prepare your record for defense. There has been no record made

that would put this case on ice, so to speak, as far as you are concerned. Now, very clearly had the board of trustees adopted a resolution saying that they would not permit the exclusive use of any of the state university and college facilities by private, racially discriminatory academies, I would regard it as moot, even though they have fixed terms and are subject to going out of office in the future. I think that is getting into speculation. But they have not as of now taken any position. I do not know what their view is. They may think there is nothing wrong . . . .

• • •

The Court: But that is what is bothering the Court. There has been no declaration of policy that would inform this Federal Court that there is no need to issue.

Mr. Noble: Your Honor, again the representation of Mr. Leventhal was that these children in Coahoma County —have they been injured? Have they been injured in Clarksdale? Has there been any benefit derived from it at all to Lee Academy which is represented in the Complaint? Has there? Mr. Leventhal has not presented any statistics that one white child has withdrawn from the black schools over there because of it.

The Court: [I]f I thought holding the case open for 30 days would cause the board of trustees to adopt a resolution satisfactory to this Court, I would do so. But there is no indication that would be forthcoming. It has not been forthcoming. And I think that with the law being settled as it is the injunction would possibly be a useful thing not only to members of the plaintiff class but also to the board and to college administrators. It would give them something on which they could stand if requests are made in the

future by racially discriminatory school groups. So I cannot say that merely because there has been a withdrawal of the request by one or the other defendant that there is no reasonable expectation that the wrong will not be repeated. We all know that when these requests come from—if they do come from racially discriminatory schools that they are difficult to turn down. The Court is not naive. The only way they could be turned down effectively and feasibly would be to have something on the books that says they cannot be used.

So I am going to grant the permanent injunction on the basis of this jacket file and the statement made by counsel today.

Letter to District Court

March 29, 1973

Honorable William C. Keady
United States District Judge
Post Office Box 190
Greenville, Mississippi 38701

Re: *Bennie Stone Gooden, et al.*
v. *Mississippi State*
University, et al.,
Civil Action No. EC72-12(K)

Dear Judge Keady:

In accordance with your instructions, I enclose a proposed order. I have attempted to set forth the standard adopted by the Fifth Circuit in *Gilmore* v. *City of Montgomery*. . . . 3. In accordance with your instructions, I have included a paragraph denying plaintiffs an award of attorney's fees. However, I enclose a copy of a recent Fifth Circuit opinion (*Johnson* v. *Combs,* 471 F.2d 84 (5th Cir. 1972)), which makes an award of such fees mandatory in a case such as this.

I respectfully ask the Court to reconsider its denial of a fee in light of *Combs.*

Sincerely,

Melvyn R. Leventhal

MRL:msc
Enclosures

cc: Ed Davis Noble, Jr., Esquire

Order

(Title Omitted)

This cause having been heard on March 22, 1973, on plaintiffs' motion for a permanent injunction, and the court having considered memorandum briefs, and the contents of the jacket file and having taken judicial notice of certain facts recorded in the court reporter's notes of these proceedings; it is

ORDERED

(1) Defendant, Board of Trustees of Institutions of Higher Learning, is permanently enjoined from allowing or permitting gymnasiums, athletic fields, and other school facilities of all colleges and universities subject to its control or jurisdiction to be used for the holding of contests, activities and programs sponsored by Academy Athletic Conference (also known as Academy Activities Commission of the Mississippi Private School Association), or its member schools, or any other private school which does not enroll black students; provided, however, that this shall not preclude any student, or group of students attending any private school from access to such facilities under defendants' control when such facilities are open to the general public on a nonexclusive, communal basis. *Gilmore* v. *City of Montgomery*, Fifth Circuit Court of Appeals No. 72-1610, Slip Opinion February 9, 1973.

(2) The defendant, Board of Trustees of Institutions of Higher Learning, shall notify the president, chancellor or executive head of each college or university subject to its jurisdiction of the requirements of this order.

(3) Plaintiffs' motion for an award of attorney's fees is hereby denied.

Order

The clerk of this court is directed to serve a copy of this order by certified mail upon Dr. E. E. Thrash, Executive Secretary and Director of the Board of Trustees of Institutions of Higher Learning, Jackson, Mississippi.

This, 4th day of April, 1973.

WILLIAM C. KEADY
Chief Judge
United States District Court

Appeals Court Opinion

Gooden, et al. v. *Mississippi State University, et al.*,
5th Cir. No. 73-2108

ENTERED AUGUST 19, 1974

Appeals from the United States District for the Northern District of Mississippi.

Before:

BELL, DYER and CLARK,

Circuit Judges.

PER CURIAM:

Plaintiffs, three black students attending public school in Clarksdale, Mississippi, sued on behalf of a class comprised of "students throughout the State of Mississippi who are aggrieved by the policies and practices of the defendants complained of herein." The complaint, filed February 14, 1972, alleged that "numerous private racially segregated schools and academies," as members of the Academy Athletic Conference, had been granted permission by Mississippi State University to use the University's gymnasium and facilities to hold basketball games on February 21-26, 1972. It was further asserted that this action provided state aid and encouragement to such member schools and thereby impeded the achievement of racially integrated public schools. Preliminary injunctive relief was sought to stop Mississippi State from allowing the tournament, and permanent injunctive relief was requested denying the Academy Athletic Conference the use of all facilities controlled by the Board of Trustees of Institutions of Higher Learning, which oversees the eight public four-year collegiate institutions in the state. The defen-

dants were the president of Mississippi State University and the Trustees of the Institutions of Higher Learning. They answered admitting that permission had been given for the use of Mississippi State's facilities on February 21-26, but alleged that on the same day the complaint had been filed the Academy Athletic Conference withdrew its request, and the games had not been played on state property. A hearing consisting solely of statements and arguments of counsel, was held in February of the following year. The district judge made no findings of fact but issued this injunction on April 4, 1973:

> Defendant, Board of Trustees of Institutions of Higher Learning, is permanently enjoined from allowing or permitting gymnasiums, athletic fields, and other school facilities of all colleges and universities subject to its control or jurisdiction to be used for the holding of contests, activities and programs sponsored by Academy Athletic Conference (also known as Academy Activities Commission of the Mississippi Private School Association), or its member schools, or any other private school which does not enroll black students; provided, however, that this shall not preclude any student, or group of students attending any private school from access to such facilities under defendants' control when such facilities are open to the general public on a nonexclusive, communal basis. Gilmore v. City of Montgomery, [473 F.2d 832 (CA 5, 1973) 1973].

Both parties appeal. Defendants seek to vacate the injunction. Plaintiffs protest the court's failure to award them attorneys' fees. Defendants protest the issuance of the injunction as an imprudent exercise of the court's equitable power because (1) none of the circumstances

present in *Gilmore* was shown to be present in this case, (2) no threat of similar requests or approvals in the future was shown, and (3) at the time of issuance the cause was moot. Plaintiffs contend that the court's action must be judged in light of its knowledge of the existence of a widespread network of private schools that pose a threat to the success of public school integration—knowledge which was gained from taking judicial notice of its own records in Norwood v. Harrison, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973). They reason from this that it was permissible for the court to conclude that the Board of Trustees of Institutions of Higher Learning had an affirmative duty to adopt a negative policy forbidding use of all facilities under their supervision in the manner enjoined. Plaintiffs' cross-appeal claims that Section 718 of Title VII, 20 U.S.C. § 1617,[1] applies and, coupled with the decisions in Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) and Johnson v. Combs, 471 F.2d 84 (5th Cir. 1972), mandates the award of attorneys' fees in this case.

Because the Supreme Court granted certiorari in *Gilmore, supra,* 414 U.S. 907, 94 S.Ct. 215, 38 L.Ed.2d 145 (1973), and Bradley v. Richmond School Board, 412 U.S. 937, 93 S.Ct. 2773, 37 L.Ed.2d 396 (1973), the latter case relating to the applicability of Section 718, we withheld

[1] Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

the disposition of the instant appeal pending its decisions in those cases, which have now been handed down. Gilmore v. Montgomery, —— U.S. ——, 94 S.Ct. 2416, 41 L.Ed.2d —— (1974); Bradley v. Richmond School Board, —— U.S. ——, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). Even with the guidance provided, the central issue in this cause continues to be whether a controversy which would support injunctive relief remained after the withdrawal of the single private school request for use of public facilities.

Although the question for resolution on this appeal might be posed in terms of standing, *i.e.*, did plaintiffs show an injury to themselves resulting from defendants' action;[2] or in terms of ripeness, *i.e.*, did plaintiffs demonstrate a realistic possibility that the actions of defendants would injure them;[3] or in terms of abuse of discretion, *i.e.*, was the injunction unsupported or overbroad,[4] the issue here

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[2] In Pevsner v. Eastern Air Lines, 493 F.2d 916 (5th Cir. 1974), we affirmed the dismissal for lack of standing of a class action claim by one who had been overcharged for an air line ticket, because the initial overcharge was placed on a Bank Americard form and somehow got reduced to a proper charge before being billed to Pevsner.

[3] In International Tape Manufacturers Association v. Gerstein, 494 F.2d 25 (5th Cir. 1974), an injunction against enforcement of a Florida tape piracy statute was vacated as granted in a controversy lacking ripeness where the proof failed to disclose how plaintiffs' members would be affected by the law or that any prosecution had been had or threatened under the law. *See n.* 8 comparing the doctrines of "standing", "ripeness" and "mootness".

[4] Only Mississippi State University was shown to have acted, yet the injunction controlled the actions of the Board of Trustees at all eight collegiate institutions under their control which were located throughout the state. Its single action was a year prior to our decision in *Gilmore*. The district court never entered any order on the maintainability of this action as a class suit. Fed.R. Civ.P. 23(c). The effect on Clarksdale high school students of the proposed but aborted Starkville basketball tournament was not demonstrated except by the unarticulated inferences which might

is most properly classified as raising the question of mootness, *i.e.*, does the cause lack the concrete adverseness necessary to an Article III case or controversy?

This court has on several occasions this year held causes moot—when the allegedly offending action was rescinded, *see* Barron v. Bellairs, 5 Cir., 496 F.2d 1187 [1974] (new Georgia welfare statute enacted prior to entry of injunctive relief),—when the proof failed to show the complaining party was or would be injured by the challenged actions of the defendant, *see* National Lawyers Guild v. Board of Regents, 5 Cir., 490 F.2d 97 (injunction requiring use of college facility for meeting held moot where meeting date set had long gone by and no showing was made that required co-sponsorship by college dean had been sought or refused); and Merkey v. Board of Regents, 5 Cir., 493 F.2d 790 (where plaintiff was a non-student at the time of appeal and no student was shown to seek recognition for a college club, the action demanding recognition was moot —Judge Goldberg dissented),—and when the matter in controversy has become passe, *see* De Simone v. Lindford, 5 Cir. 494 F.2d 1186 (request for injunctive relief pending completion of administrative review held moot upon final agency decision); United States Servicemen's Fund v. Killeen Independent School District, 5 Cir., 489 F.2d 693 (right to use a high school auditorium for a "Counter-USO Show" by Viet Nam war protesters held moot after the conflict ended); and Hollon v. Mathis Independent School District, 5 Cir., 491 F.2d 92 (injunction suspending a school rule against married athletes mooted by plaintiff's graduation).

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be drawn from facts established in the record from Norwood v. Harrison, *supra*. The asserted affirmative duty of the Board to adopt a policy forbidding the grant of exclusive use of facilities to private school students is devoid of support in the record. *See* n. 10 to *Gilmore, supra*, —— U.S. at ——, 94 S.Ct. 2416.

Reference to these holdings and the authorities they cite suffices for articulation of the underlying legal principles.

[1] Assuming, without deciding, that the single instance of collegiate level action which never came to fruition may have supported an injunction against the officials of that college prior to the withdrawal of the private school request, or that other instances of aid or support to private schools in violation of plaintiffs' rights might have been proven and supported injunctive relief, a full year intervened without any indication of similar subsequent actions or threats to act by any of the defendants. No proof was made that permission of this sort had ever previously been given. No controversy between adverse interests was demonstrated to exist.[5]

[2] Assuming, again without deciding, that Section 718 may be applicable in a moot case, no finding that these proceedings were necessary to bring about compliance with statutory or constitutional rights was made or could be supported by this record.[6] Without such a finding, Section 718 affords no basis for a fee award. The cross-appeal is without merit.

The injunction order appealed from is vacated and the cause is remanded with directions to the court below to dismiss the action as moot.

Vacated and remanded.

---

[5] Time may alter any relationship. Hence even permanent injunctive orders must continue to find justification in present conditions. Today, the Supreme Court's decision in Gilmore has so far clarified the law in this area that if any particle of the subject matter of the present action, which we hold became moot long ago, did remain justiciable, it has become moot now.

[6] As a part of the permanent injunction order the district court simply recited, "Plaintiffs' motion for an award of attorneys' fees is hereby denied."

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1973

No. 73-2108

D. C. Docket No. CA EC 7212-K

BENNIE STONE GOODEN, JR., *etc., et al.,*

Plaintiffs-Appellees-Cross Appellants,

versus

MISSISSIPPI STATE UNIVERSITY, *etc., et al.,*

Defendants-Appellants-Cross Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Before

BELL, DYER and CLARK,

Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby,

vacated; and that this cause be, and the same is remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees-cross appellants pay to defendants-appellants-cross appellees, the costs on appeal to be taxed by the Clerk of this Court.

August 19, 1974

Issued as Mandate:

Denial of Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
600 CAMP STREET NEW ORLEANS, LA. 70130

EDWARD W. WADSWORTH, CLERK

October 16, 1974

TO ALL COUNSEL OF RECORD
73-2108

Re: GOODEN v. MISSISSIPPI STATE UNIVERSITY

Dear Counsel:

This is to advise that an order has this day been entered denying the petition (x) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition (x) for rehearing en banc has also been denied.

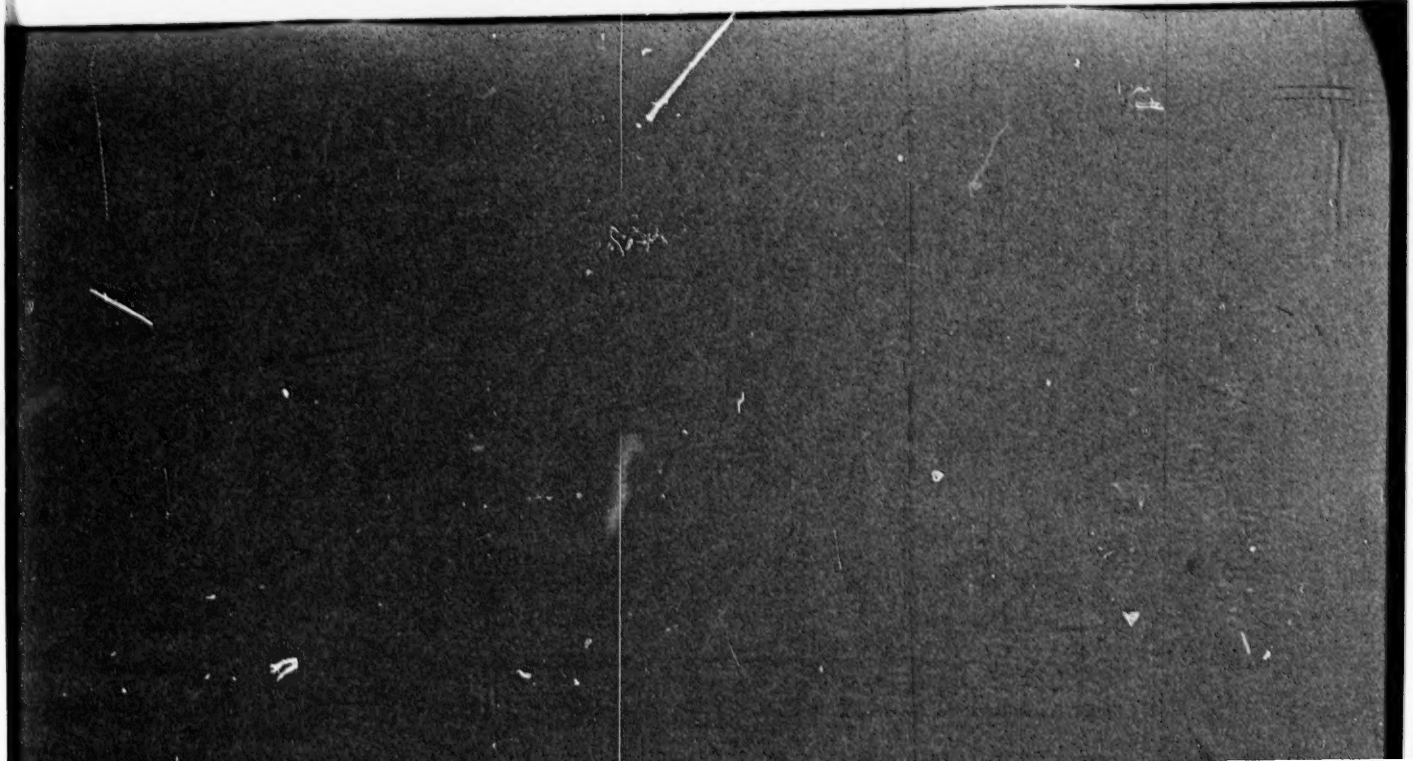
See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By ANNE G. PARENT
Deputy Clerk

cc: Mr. A.F. Summer
Mr. Wm. A. Allain
Mr. Ed Davis Noble, Jr.
Mr. Melvyn R. Leventhal
Mr. Jack Greenberg



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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-580

BENNIE STONE GOODEN, ET AL.,
Petitioners,

vs.

MISSISSIPPI STATE UNIVERSITY, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the lower courts are adequately presented in the petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1974. The petition for a rehearing or in the alternative a rehearing *en banc* was denied on October 16, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I.

Whether the Court of Appeals was correct in vacating the permanent injunction issued by the district court which was based solely upon a record consisting of little more than oral argument of counsel, and completely void of any supportive proof.

II.

Whether an actual live controversy existed at the time of the hearing in the district court as mandated by Article III, §2, of the Constitution of the United States; *Golden* v. *Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969) and *Steffel* v. *Thompson*, ... U.S. ....., 94 S.Ct. ....., 39 L.Ed.2d 505 (1974) or was this action rendered moot over a year before.

III.

Whether the petitioners are entitled to an award of attorney's fees when neither the district court nor the Court of Appeals found any basis in the record for granting them under 20 U.S.C.A. §1617.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This cause involves Article III, Section 2, Constitution of the United States and 20 U.S.C.A. §1617:

"§1617 Attorneys Fees.

Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with

any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of Title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, *the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow* the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. (Emphasis added)"

STATEMENT OF THE CASE

Early in 1972, the defendant, Mississippi State University, granted the Academy Athletic Conference of the Mississippi Private School Association (AAC) permission to use the University's gymnasium and related athletic facilities for holding an overall conference championship in basketball. The games were scheduled to be held the week of February 21-26, 1972. Mississippi State also authorized the AAC to use the University's gymnasium and other campus facilities for conducting its all-star games in basketball. These particular games were scheduled during the second week in March, 1972.

These athletic contests were never held on the campus of Mississippi State University.

This class action was filed February 14, 1972, on behalf of certain black students in attendance at the Clarksdale Municipal Separate School District, Clarksdale, Mississippi. They sued on behalf of "students throughout the State of Mississippi who are aggrieved by the policies and practices of the defendants complained of herein." The gravamen of the Complaint consisted of allegations that the proposed use of the facilities at Mississippi State for the

purpose of the AAC basketball tournaments would be of such benefit to the Conference as to deny those black students their right to an integrated education.

The plaintiffs sought an immediate hearing for a preliminary injunction or, in the alternative, a temporary restraining order. The necessity of such relief was negated by the recision of the AAC's request to utilize the facilities of Mississippi State University for the functions complained of.

> "The Academy Activities Commission of the Mississippi Private School Association wishes to withdraw *any and all* of its requests to hold functions at Mississippi State University as of this date, February 14, 1972." [App., P. Brief, p. 11]

It was not until March 22, 1973, over a year, when the plaintiffs' Motion for a Permanent Injunction was heard by the district court. The proceeding is accurately described in the appellate court's opinion:

> ". . . A hearing consisting solely of statements and arguments of counsel, was held in February [March] of the following year. The district judge made no findings of fact, but issued . . . [its] . . . injunction on April 4, 1972." 499 F.2d 441, 442.

Here, as in their argument before the Court of Appeals, the defendants state:

> ". . . the issuance of the injunction was an imprudent exercise of the court's equitable power because (1) none of the circumstances present in *Gilmore* was shown to be present in this case, (2) no threat of similar requests or approvals in the future was shown, and (3) at the time of the issuance the cause was moot." 499 F.2d 441, 442.

Given this obvious lack of factual support for injunctive relief, neither the district court nor the Court of Appeals found no rationale to award attorney's fees pursuant to 20 U.S.C.A. §1617. Indeed, the district court made no discretionary finding as mandated by the statute, and the Circuit Court affirmed, 499 F.2d 441, 444.

ARGUMENT

This case was held in abeyance by the United States Court of Appeals for the Fifth Circuit pending decisions of this Court in *Gilmore* v. *City of Montgomery*, ... U.S. ....., 94 S.Ct. 2416, 41 L.Ed.2d 304 (1974) and *Beadley* v. *Richmond School Board*, ... U.S. ....., 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). Given the subsequent pronouncements, the appellate court succinctly stated the issue now before this Court:

> "Even with the guidance provided, the single issue in this cause continues to be whether a controversy would support injunctive relief remained after the withdrawal of the single private school request for the use of public facilities." 499 F.2d 441, 443.

I.

The Court of Appeals Was Correct in Vacating the Permanent Injunction Granted by the District Court Because the Record Is Completely Void of Any Proof That Gilmore Circumstances Existed at Mississippi State University.

At the very least, the existence of an actual case or controversy was removed by the withdrawal of the request to use the facilities at Mississippi State University

by the initiating party, the Academy Activities Commission, of the Mississippi Private School Association. This is true, for as stated (and therefore admitted) in the petition, page 3, ". . . *all* private . . . schools with athletic programs . . . are members of the Academy Athletic Conference. . . ." All that remained after AAC withdrawal on February 14, 1972, was the ghost-like possibility that something might have happened in the past and/or might happen in the future. This is insufficient grounds for a permanent injunction. U. S. Const., Art. III, §2; *O'Shea* v. *Littleton*, ... U.S. ....., 94 S.Ct. 669, 38 L.Ed.2d 674, 682 (1974):

> "Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. Massachusetts v. Mellon, 262 U.S. 447, 488, 67 L.Ed. 1078, 43 S.Ct. 597 (1923). The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' Golden v. Zwickler, 394 U.S. 103, 109-110, 22 L.Ed.2d 113, 89 S.Ct. 956 (1969); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 85 L.Ed. 826, 61 S.Ct. 510 (1941); United Public Workers v. Mitchell, 330 U.S. 75, 89, 91 L.Ed. 754, 67 S.Ct. 556 (1947)."

This cause alleges the existence of certain constitutional facts established by impermissible acts of the defendants. For the petitioners in *Gooden* to be successful, it is necessary for them to prove that their allegations place this case within the ambit of *Gilmore*. This they cannot do. Neither in the district court record nor the circuit court opinion is there any finding whatever that particular circumstances did in fact exist, that the defen-

dants had committed certain acts, and that as a result, related unconstitutional policies were present:

> "Instead of prompt and orderly compliance with the District Court's mandate, however, the City of Montgomery engaged in an elaborate subterfuge to anticipate and circumvent the Court's order." 41 L.Ed.2d 304, 315, 316.
>
> • • •
>
> "Particularly important is the fact that the city's policies operated directly to contravene an outstanding school desegregation order." 41 L.Ed.2d 304, 316.
>
> • • •
>
> "Certainly, the city's officials were aware of this order and were responsible for seeing that no actions on their part would significantly impede the progress of school desegregation in the city." 41 L.Ed.2d 304, 316.
>
> • • •
>
> "Here, the city's actions significantly enhanced the attractiveness of segregated private schools, formed in reaction against the federal court school order, by enabling them to offer complete athletic programs." 41 L.Ed.2d 304, 317.
>
> • • •

and,

> "We are persuaded . . . that this assistance significantly tended to undermine the federal court order mandating the establishment and maintenance of a unitary school system in Montgomery." 41 L.Ed.2d 304, 317.
>
> • • •

More importantly,

> *"The essential finding justifying further relief would be a showing of a direct impairment of an outstanding school desegregation order."* 41 L.Ed.2d 304, 318. (Emphasis added)

The record in this case contains no evidence that any circumstances remotely similar to *Gilmore* has occurred at an institution of higher learning of Mississippi. Neither Mississippi State University nor the Board of Trustees of State Institutions of Higher Learning was under any judgment of the kind against the City of Montgomery. At the time of the filing of the complaint, the district court opinion in *Gilmore* was unpublished and the appellate decision had not been rendered. 499 F.2d 441, 443, fn. 4.

The one instance which might have, did not occur. On that foundation, the defendants note the lack of injury to the complaining party and, of course, any significant adverse effect upon the desegregation of public schools in Mississippi, which was the point of major concern in *Gilmore*. At 499 F.2d 441, 443, fn. 4, the Court of Appeals found:

> "Only Mississippi State University was shown to have acted, yet the injunction controlled the actions of the Board of Trustees at all eight collegiate institutions under their control which were located throughout the state. Its single action was a year prior to our decision in Gilmore. The district court never entered any order on the maintainability of this action as a class suit. Fed.R.Civ.P. 23(c). The effect on Clarksdale high school students of the proposed but aborted Starkville basketball tournament was not demonstrated except by the unarticulated inferences which

might be drawn from facts established in the record from Norwood v. Harrison, supra. The asserted affirmative duty of the Board to adopt a policy forbidding the grant of exclusive use of facilities to private school students is devoid of support in the record. See n. 10 to Gilmore, supra, ... U.S. at ....., 94 S.Ct. 2416."

Judicial notice of *Norwood* v. *Harrison*, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973) in this case is inappropriate and inapplicable. First, it was an entirely unrelated cause composed of different defendants and different subject matter. Secondly, *Norwood*, supra, was submitted to the Court on compiled record, consisting to the largest extent of depositions. Lastly, the utilization of such information against non-parties not represented was not contemplated by and was in direct conflict with Rule 32(a), F.R.Civ.P.

Judicial notice is not judicial knowledge. *Shapleigh* v. *Mier*, 299 U.S. 468, 475, 57 S.Ct. 261, 81 L.Ed. 355, 359 (1937).

II.

There Has Been No Injury to the Complainants; This Action, Because of the Withdrawal of the Request by the AAC, Is Moot.

To recapitulate, the facilities of Mississippi State University were never utilized by the Academy Athletic Conference. The issuance of a preliminary injunction in this cause was unnecessary since the request of the AAC was withdrawn. The Court of Appeals was correct: The motion for a permanent injunction in the district court was academic since the record clearly shows no further overt acts had occurred.

The courts below did not make findings as to the existence of any "forbidden acts" prior or subsequent to the proposed (later rescinded) tournaments at the institution. Thus, on the record now before this Court, no basis exists to determine whether any allegation presented is prohibited by the Constitution. *Meltzer* v. *Board of Public Instruction*, 480 F.2d 552 (5 Cir. 1973).

Without specific, live and continuing injury to a federally protected right, this cause lacks the case or controversy necessary to invoke jurisdiction. Bare allegations are insufficient. In *Golden* v. *Zwickler*, 394 U.S. 103, 107, 89 S.Ct. 956, 22 L.Ed.2d 113, 117 (1969), this Court held the district court in error and reversed, finding that a hearing based solely upon oral arguments of counsel was not foundation for a declaratory judgment.

> "[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field. United Public Workers of America v. Mitchell, 330 U.S. 75, 89, 91 L.Ed. 754, 766, 67 S.Ct. 556 (1947). The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. *Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.*" Maryland Casualty Co. v. Pacific Coal & Oil Co.,

312 U.S. 270, 273, 85 L.Ed. 826, 828, 61 S.Ct. 510 (1941). (Emphasis added)

See also *Steffel* v. *Thompson*, ... U.S. ....., 94 S.Ct. ....., 39 L.Ed.2d 505, 515 (1974).

The allegations of the petition focus upon speculative injury that might have resulted from an event which never occurred. This argument has no weight. Again, "[a]bstract injury is not enough." *O'Shea* v. *Littleton*, ... U.S. ....., 94 S.Ct. 669, 38 L.Ed.2d 674, 682 (1974); *Alabama* v. *Woody*, 473 F.2d 10, 13, 14 (5 Cir. 1973). With the presence of uncontroverted fact that with the passage of time no similar incident had arisen, this case, on its facts, is clearly distinguishable from *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969) and *Super Tire Engineering Co.* v. *McCorkle*, ... U.S. ....., 94 S.Ct. ....., 40 L.Ed.2d 1 (1974), for there is no indication on the record whatever of a "likelihood of reoccurrence." As pointed out earlier, all Mississippi private schools belong to the AAC. There is no other party to reactivate the controversy, if any. As such, there is simply inadequate foundation for a justiciable controversy and the resulting relief. With the withdrawal of its application, the AAC brought the brief episode to a close; no *Gilmore* violation exists and no constitutional question persists.

> "No presumptions flow from mere allegations; no one can be required, consistent with due process, to prove the absence of violation of law." *Norwood* v. *Harrison*, 413 U.S. 455, 471, 93 S.Ct. 2804, 37 L.Ed.2d 723, 735 (1973).

Of necessity, it well bears repeating that the single one-shot affair (permission) which precipitated this litigation took place at only one of the eight public institutions of higher learning in Mississippi. There were only two

parties involved—the AAC and Mississippi State University. *Gooden*, 449 F.2d 441, 443, fn. 4. The petitioners, then, cannot satisfy this Court that the decision below was incorrect and that permanent injunctive relief is needed.

> "[T]he moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, *something more than* the mere possibility which serves to keep the case alive." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633, 97 L.Ed. 1303, 73 S.Ct. 894 (1953). (Emphasis added)

Petitioners could not prove and did not prove the existence of a live and continuing controversy at the time of the injunctive hearing in the district court March 22, 1973. That was the proper moment for inquiry as to whether an actual controversy existed. *Golden* v. *Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 22 L.Ed.2d 113, 117 (1969). The question then arises as to whether the case became moot before it was finally adjudicated by the district court. The appellate court from which this petition has arisen has spoken to that question. Relying upon a landmark opinion of this Court in *New Left Education Project* v. *Board of Regents*, 472 F.2d 218, 220 (1973), the Fifth Circuit held:

> "If a case becomes moot before a final adjudication, we must vacate the judgment and direct that the case be dismissed. The District Court has no power to decide moot cases. Art. III, Const.; and Muskrat v. United States, 1910, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246."

Or, as this Court stated in *North Carolina* v. *Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971):

> "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them."

III.

The Decisions Below Do Not Contain the Necessary Finding for Attorney's Fees under 20 U.S.C.A. §1617; Therefore, No Basis for the Award Exists.

The petitioners concede, as they must, that the very language of 20 U.S.C.A. §1617 is discretionary in nature, providing that the district court *may*, upon certain findings on noncompliance with provisions of that statute, award reasonable attorney's fees. Granting of such fees then is by no means automatic with the filing of a lawsuit, and here the cause falls short of any foundation whatever of allowing this compensation. First, the district court made no determination; it simply stated, "Plaintiffs' motion for attorney's fees is hereby denied." *Gooden*, 499 F.2d 441, 444, fn. 6. Secondly, the Court of Appeals affirmed, 499 F.2d 441, 444.

> "Assuming, again without deciding, that Section 718 may be applicable in a moot case, no finding that these proceedings were necessary to bring about compliance with statutory or constitutional rights was made or could be supported by this record. Without such a finding, Section 718 affords no basis for a fee award. The cross-appeal is without merit."

A careful chronology of *Gooden* with *Gilmore* clearly indicates that the case falls outside the ambit of §1617. The district court opinion of *Gilmore*, 337 F.Supp. 22 (M.D. Ala., 1972) was decided less than a month before this action was filed. This opinion of mere persuasive authority

had not been reported when this incident came swiftly to a close February 14, 1972. The Circuit Court opinion, 473 F.2d 832 (5 Cir. 1973), was rendered February 9, 1973, almost one calendar year *after* the withdrawal of the request by the Academy Athletic Conference.

More importantly, though, is this action was moot before the effective date of §1617, July 1, 1972. The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. *Steffel* v. *Thompson*, ... U.S. ....., 94 S.Ct. ....., 39 L.Ed.2d 505, 515 (1973); *Roe* v. *Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *S.E.C.* v. *Medical Comm. for Human Rights*, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950).

This ephemeral episode ceased the day it was filed. Surely the facts herein place this particular case within the *Northcross* v. *Memphis City Schools*, 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed.2d 48, 51 (1973) exception where ". . . special circumstances would render an award unjust."

CONCLUSION

The injunctive relief granted by the district court went beyond jurisdictional grounds since a hypothetical threat based upon speculative facts is not foundation to support such an action. The argument of petitioners for attorney's fees presupposes the existence of certain facts and is predicated upon nonexistent ones. For these rea-

sons, the petitioners' request for a Writ of Certiorari should be denied.

Respectfully submitted,

A. F. SUMMER, Attorney General
State of Mississippi

WILLIAM A. ALLAIN
First Assistant Attorney General

ED DAVIS NOBLE, JR.
Special Assistant Attorney General

CERTIFICATE

I, Ed Davis Noble, Jr., Special Assistant Attorney General, do hereby certify that I have mailed this day by United States Mail a true copy of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari to:

Jack Greenberg, Esquire
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THIS the 2nd day of December, 1974.

ED DAVIS NOBLE, JR.

SUPREME COURT, U. S.

DEC 19 1974

IN THE

Supreme Court of the United States

October Term, 1974

No. 74 580

BENNIE STONE GOODEN, *et al.*,

Petitioners,

v.

MISSISSIPPI STATE UNIVERSITY, *et al.*

SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF CERTIORARI

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IN THE

Supreme Court of the United States

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Petitioners file this Supplemental and Reply Brief in Support of Certiorari pursuant to Supreme Court Rules 24 (4) & (5).

I.

Reply Brief

1. We agree with respondents that the:

> appellate court succinctly stated the issue now before this court:
>
> > 'the single issue in this cause continues to be whether a controversy which would support injunctive relief remained after the withdrawal of the single private school request for the use of public facilities.' [1]
>
> [Brief in Opposition, p. 5, Appeals Court Opinion, Pp. 25a.]

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[1] We do, however, contest the statement that there was only "a single private school request." See Pp. 14, n. 11.

As we demonstrate below, this critical issue is unnecessarily clouded by a series of supplemental arguments or asides advanced by respondents and the Court of Appeals.

(A) Respondents assert that the Court of Appeals properly characterized the trial court hearing as statements of counsel without findings of fact (p. 4, Brief in Opposition). Rule 52(a) is fully satisfied without formal findings when, as herein, the district court expresses with clarity the bases for its decision. Pp. 5-6, 13a-18a. But even if it is assumed that the district court acted too casually, still: a) the decision below does not turn or even rely on that deficiency and b) the remedy therefor is not dismissal but a remand for further findings. See discussion in Moore's *Federal Practice*, Vol. 5A, ¶ 52.06, p. 2705, *et seq.*, and in particular pp. 2718-23.

(B) Respondents (p. 5, Brief in Opposition), rely heavily upon the alleged "lack of factual support for injunctive relief." The pleadings confirmed the continued existence of an unlawful policy: private schools which discriminate on the basis of race were authorized and continue to be authorized to use public university facilities for the conduct of athletic contests. Defendants at the hearing before the district court declined to offer any proof of a change in that policy.[2] These facts are at the foundation of the district court's injunctive order; and since defendants bear the "heavy burden" of making it "absolutely clear" that the "wrongful behavior could not reasonably be expected to recur," [*United States* v. *Phosphate Export Ass'n.*, 393 U.S. 199, 203 (1968)], the silent record evidences a "lack of factual support" for a finding of *mootness* and reinforces plaintiff's right to injunctive relief.

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[2] Indeed, they do not advise this Court, nor did they advise the Court of Appeals, of any change in policy.

(C) The Court of Appeals dismissed this action as moot because of the alleged voluntary cessation of unlawful activity; its assertion, in footnote (Pp. 25a, n. 4), that plaintiffs failed to prove injury from the policy under challenge was therefore not discussed in the Petition. Nevertheless, respondents press the issue (Brief in Opposition, pp. 8-9) and a response is appropriate.

Respondents' position and the appeals court suggestion are overwhelmed by precedent unanimously entered by this Court. Black children attending public schools are perhaps the only parties with standing to challenge, as violative of Equal Protection, state aid to private racially segregated schools.[3] They have successfully done so, in behalf of all black school age children in a given state, in *all* of the tuition grant cases, and more recently in cases challenging tax exemptions and textbook aid.[4] This Court has specifically held that "concrete injury . . . [is] suffered" by such children when the State violates its "constitutional obligation . . . [to] steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." *Gilmore* v. *City of Montgomery*, 41 L.Ed. 2d 304, 318, n. 10; *Norwood* v. *Harrison*, 413 U.S. at p. 467. Accordingly, footnote 10 of *Gilmore, supra*, cited by respondents and the Court of Appeals, supports rather than undermines petitioners' position: the misgivings expressed therein related to the standing of plaintiffs "to an action desegregating . . . city parks and recreational facil-

[3] However, a suit to desegregate or gain admission to schools allegedly discriminatory may be best litigated by black children denied admission.

[4] See, for example *Norwood* v. *Harrison*, 413 U.S. 455 (1973) and cases cited therein at page 463, n. 6, and *Green* v. *Connally*, 330 F. Supp. 1150, *aff'd sub nom. Coit* v. *Green*, 404 U.S. 997, (1971).

ities" to challenge state aid to segregationist private schools; but the standing of black children in public schools to challenge such aid was specifically upheld.

(D) Respondents argue that the injunctive order was "overbroad" noting that only one university was shown to have acted while the order covered all institutions of higher learning. (Brief in Opposition, p. 8). The district court's basis for awarding comprehensive injunctive relief was defendants' admission that they have "plenary authority" over all public institutions of higher learning. (Pp. 3a and 9a). The gravamen of the Complaint, as the Court of Appeals observed, (Pp. 24a), was the failure of such defendants to adopt a policy against the unlawful use of facilities subject to its control in the same way that the Mississippi Textbook Purchasing Board failed to adopt such a policy for the use of state textbooks in *Norwood* v. *Harrison, supra.* The unlawful use at Mississippi State was but a symptom of the underlying state-wide policy. But even if the district court order is "overboard" then still the appropriate disposition is not dismissal of the entire action but instead a remand for further findings to determine whether the injunction should extend to institutions other than Mississippi State University.

(E) Finally, respondents claim that the conduct under challenge was not clearly unlawful until the Court's decision in *Gilmore; Gilmore,* in the district court, "was decided less than a month before this action was filed." (Brief in Oppostion, p. 13). We remind the Court that the policy under challenge, but for the district court order now vacated by the Court of Appeals, *is still in effect.*

Moreover, *"it is well established* that federal courts may enjoin any state assistance to private school organizations which serves to 'impede, thwart or frustrate the execution

of the integration plan mandated against a public school district,'" and that "the adverse effects of the creation of all-white private schools on public school desegregation *have long been recognized. . . .*" *Gilmore* v. *City of Montgomery*, 473 F.2d 832, 835-36, (5th Cir. 1973), citing *Cooper* v. *Aaron*, 358 U.S. 1 (1958), (emphasis added). The difficult question raised in *Gilmore*, and on which the Court granted *certiorari*, was whether and/or under what circumstances, may private racially discriminatory organizations, *not school affiliated*, use public recreational facilities. Accordingly, it is idle for respondents to claim that *Gilmore* as opposed to *Brown* or *Cooper* v. *Aaron* established their action as unlawful.

II.

Supplemental Brief

1. A recent summary action by this Court well illustrates the difference between a finding of mootness based upon a change in plaintiff's status and mootness based upon the cessation of unlawful activity. In *Regan* v. *Johnson*, S. Ct. No. 74-108, November 18, 1974 [43 L.W. 3216; 43 L.W. 3294], the Court of Appeals held certain parole procedures violative of due process although plaintiff had been paroled while the case was pending on appeal; this Court vacated the judgment and remanded with directions to dismiss the case as moot. The subject matter of the action—parole policies and procedures—was still in controversy but plaintiff, once paroled, could not claim any injury therefrom. Summary dismissal in the appeals court is appropriate in such a case, while broad discretion in, and a determination by the district court, is required when defendant's claim of mootness is based upon the alleged cessation of unlawful conduct.

2. A suit has been filed challenging Miss. Code, 1972, § 47-5-91 to the extent that it authorizes, and the Mississippi State Penitentiary has expended funds for, tuition grants and transportation aid for penitentiary employees' children enrolled in segregationist academies. *Armstrong et al.* v. *Jack Reed, Superintendent of Parchman Penitentiary, et al.*, N.D. Miss., Civil Action No. GC 74 118-K, November 22, 1974. (The statute is referred to in footnote 9 of the Petition, page 13.)

Respectfully submitted,

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